

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2004-0438, Gordon R. Blakeney, Jr. & a. v. City of Concord & a., the court on August 17, 2005, issued the following order:**

The petitioners, Gordon R. Blakeney, Jr., Frances T. Blakeney, Laurie M. Blakeney, and Carol F. Hargrove, appeal a decision of the trial court granting summary judgment to the respondent, City of Concord (City). We affirm.

In reviewing the trial court's grant of summary judgment, we consider the affidavits and all inferences properly drawn from them, in the light most favorable to the non-moving party. Marikar v. Peerless Ins. Co., 151 N.H. 395, 397 (2004). If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper. *Id.* We review the trial court's application of the law to the facts *de novo*. *Id.*

Application of this standard must be tempered, however, by the limited review standard that the superior court itself was required to apply. At issue in this case is the grant of a wetlands permit by the department of environmental services (DES) to the City to allow for the construction of a connector road. The issuance of the permit was upheld by the wetlands council, and on appeal, by the superior court. In the superior court, the burden of proof is upon the party seeking to set aside the council's decision to show "that the decision is unlawful or unreasonable. The council's decision shall not be set aside or vacated, except for errors of law, unless the court is persuaded, by a preponderance of the evidence before it, that said decision is unjust or unreasonable." RSA 482-A:10, XI. In construing this statute, we look for guidance to RSA 541:13, which provides that an agency order or decision shall not be set aside or vacated "except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." In some cases decided under this standard, we have stated that as long as competent evidence supports the agency's decision, we will not reverse its determination even if other evidence would lead to a contrary result. *See Appeal of Chapman*, 143 N.H. 503, 505 (1999); *Appeal of Murray*, 142 N.H. 910, 912 (1998). We believe this test is appropriate for review under RSA 482-A:10, XI.

Thus, we agree with the superior court that in applying the summary judgment standard in this case, its task was to determine whether there was any genuine issue of material fact as to whether the decision below met the standard set forth in RSA 482-A:10, XI. If the evidence viewed in the light most favorable

to the petitioners did not raise a genuine dispute as to whether competent evidence exists in the record to support the agency's decision, then summary judgment was proper if the City was entitled to judgment as a matter of law.

The petitioners argue that a number of disputed facts exist, pointing, for example, to evidence provided by their experts that was contrary to evidence provided by the City's experts. We agree with the trial court, however, that no dispute has been shown as to whether competent evidence exists in the record supporting the agency's decision. Accordingly, we find no error in the trial court's rulings to that effect.

The petitioners also argue that the adjudicative proceedings requirements of the Administrative Procedures Act, RSA chapter 541-A:31-:36, governed the permit application process. We disagree. We agree with the City that for wetlands permits, nonadjudicative proceedings apply. See RSA 541-A:29, II(a); RSA 482-A:8, :10, III; RSA 21-O:14, II.

We have reviewed the petitioners' remaining arguments, and find those arguments that are supported by developed legal argument to be without merit. See N.H. Dep't of Health & Human Servs. v. Bonser, 150 N.H. 250, 253 (2003); State v. Blackmer, 149 N.H. 47, 49 (2003). Accordingly, we affirm the decision of the superior court.

Affirmed.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**